

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DAVE and DIANE FITZGERALD,

Plaintiffs,

v.

ASOTIN COUNTY, et al.,

Defendants.

NO: CV-09-341-RMP

ORDER GRANTING MOTION FOR
DISMISSAL FOR FAILURE TO
PROSECUTE AND DENYING AS
MOOT MOTION FOR VOLUNTARY
DISMISSAL OF DIANE
FITZGERALD AS A PLAINTIFF

This matter comes before the Court on the motion for involuntary dismissal of Plaintiffs Dave Fitzgerald and Diane Fitzgerald's¹ lawsuit pursuant to Fed. R.

¹ The Court notes that Ms. Fitzgerald's first name is identified as "Diane" in the Complaint, ECF No. 1, Amended Complaint, ECF No. 3, yet is identified as "Diana" in her declaration, ECF No. 44, and other filings. The Court further notes that Ms. Fitzgerald is known as "Diana Keelean" since her divorce from Mr. Fitzgerald. The Court refers to Ms. Fitzgerald as "Diane Fitzgerald" for the sake

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1 Civ. P. 41(b), ECF No. 27, by Defendants Asotin County, City of Asotin, and Jeff
2 Polillo, and Plaintiff Ms. Fitzgerald's motion for voluntary dismissal pursuant to
3 Fed. R. Civ. P. 41(a), ECF No. 41, of herself as a party to the suit.

4 The Court has reviewed Defendants' motion to dismiss, ECF No. 27, and
5 accompanying memorandum, ECF No. 28, and declaration, ECF No. 30, Plaintiffs'
6 memorandum in opposition to Defendants' motion to dismiss, ECF No. 39,
7 Plaintiff Diana Fitzgerald's motion to dismiss herself as a party, ECF No. 41,
8 Plaintiff Dave Fitzgerald's affidavit, ECF No. 42, Garrett Fitzgerald's declaration,
9 ECF No. 43, Diana Fitzgerald's declaration, ECF No. 44, Defendants' reply
10 regarding their motion to dismiss, ECF No. 52, and supporting declaration, ECF
11 No. 53, and the remaining record and is fully informed.

12 **BACKGROUND**

13 This case began in November 2009 when Plaintiffs Dave and Diane
14 Fitzgerald filed a complaint against Defendants under 42 U.S.C. § 1983, the Fourth
15 Amendment to the United States Constitution, and Washington State common law
16 negligence theories for the injuries they allegedly sustained when law enforcement
17 officers from the City and County of Asotin responded to an allegedly unfounded
18
19 of continuity and clarity and because it is simply unclear whether her first name is
20 "Diana" or "Diane."

1 report of shots fired at the Fitzgeralds' home and allegedly pointed a gun "at point-
2 blank range at the head of plaintiff's minor son, G.F." ECF Nos. 1 (Complaint,
3 filed November 9, 2009) and 3 (Amended Complaint, filed February 25, 2010).
4 The Fitzgeralds also alleged ongoing harassment by law enforcement following the
5 November 2006 incident allegedly involving excessive force. ECF No. 3. They
6 sued "on their own behalf and on behalf of their marital community, and on behalf
7 of their minor son, G.F." ECF No. 3 at 1.

8 At the time Plaintiffs filed their Complaint and Amended Complaint, they
9 were represented by J. Jarrette Sandlin. In an affidavit dated March 30, 2012, and
10 filed April 2, 2012, Plaintiff Dave Fitzgerald claims that he fired Mr. Sandlin as
11 their attorney over the telephone in "approximately October of 2010." ECF No. 42
12 at 2. Mr. Fitzgerald also recalls informing Mr. Sandlin during that phone
13 conversation that "Diana and I were getting a divorce." ECF No. 42 at 2.
14 However, in November, 2010, Mr. Sandlin negotiated a release of all claims
15 against the Defendants in exchange for a \$5000 settlement. ECF No. 27 at 3.
16 Defendants agreed to the settlement in December 2010 and filed a notice of
17 settlement with the Court. ECF No. 23.

18 Mr. Sandlin signed the settlement agreement on behalf of Plaintiffs on
19 September 15, 2011. ECF No. 30-1 at 7. Furthermore, Mr. Sandlin represented to
20 this Court "under penalty of perjury," in relevant part:

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1 The plaintiffs authorized me, (through Mr. Dave Fitzgerald, and
2 verified telephonically by his wife, Ms. Diane Fitzgerald), to dismiss
3 this case. I advised Attorney Jim Baker that this was the status of the
4 case, and suggested a settlement of \$5,000.00 was fair and reasonable,
since that was the out-of-pocket costs by the Fitzgeralds, and
apparently they wished to cease litigation even though their claims
were legitimate.

5 ECF No. 31 (signed, dated, and filed March 12, 2012).

6 At some unspecified time, after Fall 2010, Mr. Fitzgerald consulted Todd S.
7 Richardson, Plaintiffs' current counsel in this matter, in relation to an automobile
8 accident, and in the course of that consultation discovered the settlement. The e-
9 mails submitted to the Court show that Mr. Richardson learned from Mr. Sandlin
10 of the settlement agreement on September 27, 2011, and assured defense counsel
11 on December 8, 2011, that he was "contacting the Fitzgeralds" and would be back
12 in touch with defense counsel. ECF No. 53-1. The Fitzgeralds' son, Garrett², who
13 is not named as a Plaintiff in this action and, therefore, is not treated as a Plaintiff
14 by the Court, further states in his April 2012 declaration that he discovered "last
15 fall" that Mr. Sandlin agreed to settle the case for \$5000. ECF No. 43 at 2.

16
17
18 ² Garrett is no longer a minor, so initials are no longer required. Moreover, the
19 Court uses his first name rather than "Mr. Fitzgerald" to avoid confusion with
20 Plaintiff Dave Fitzgerald, without intending any disrespect.

1 Despite repeated requests to Mr. Sandlin, Defendants did not receive a
2 signed order agreeing to dismiss this case. Nor had the Defendants' checks been
3 cashed. On February 24, 2012, Defendants finally moved to reopen the case and
4 moved to dismiss the case with prejudice for Plaintiffs' failure to prosecute the
5 case. ECF Nos. 25 and 27.

6 ANALYSIS

7 *Apparent Authority to Settle*

8 To this date, Plaintiffs have not moved to set aside the settlement. Yet
9 Plaintiffs, in responding to Defendants' motion to dismiss for failure to prosecute,
10 dispute that Mr. Sandlin had authority to settle on their behalf. There is a direct
11 contradiction between the Fitzgeralds' claim that they terminated Mr. Sandlin's
12 representation in "approximately October of 2010," ECF No. 42 at 2, and Mr.
13 Sandlin's representation on March 12, 2012, in a signed declaration that he was
14 authorized by Plaintiffs to dismiss the case, ECF No. 31 at 2. Throughout the
15 pleadings, Mr. Sandlin has made numerous representations that he was the
16 authorized counsel for the Plaintiffs. Even in his March 30, 2012, declaration,
17 Garrett states, "I was surprised when my Dad told me he fired Mr. Sandlin;
18 although I hadn't heard from Mr. Sandlin in a long time, I believed he was working
19 on our case. So, it surprised me to find out that Mr. Sandlin wasn't working on the
20 case and my Dad had to fire him." ECF No. 43 at 2.

1 “The construction and enforcement of settlement agreements are governed
2 by principles of local law which apply to interpretation of contracts generally.” *Jeff*
3 *D. v. Andrus*, 899 F.2d 753, 759 (9th Cir.1989). Washington, where this settlement
4 agreement was executed, applies an objective manifestation theory of contract,
5 meaning that courts do not look to unexpressed intentions regarding the formation
6 of an agreement, but instead impute an intention that corresponds to the reasonable
7 meaning of a person’s words or acts. *See Hearst Commc’ns, Inc. v. Seattle Times*
8 *Co.*, 154 Wn.2d 493, 503 (2005). “[O]nce a party has designated an attorney to
9 represent him in regard to a particular matter, the court and the other parties to an
10 action are entitled to rely upon that authority until the client’s decision to terminate
11 it has been brought to their attention” *Haller v. Wallis*, 89 Wn.2d 539, 547
12 (Wash. 1978).

13 The Court finds ample evidence in the record supports that Mr. Sandlin
14 acted with actual or apparent authority when he bound Plaintiffs to the settlement
15 agreement. *See* ECF Nos. 30 and 31. As far as the Court and the Defendants are
16 concerned, the Plaintiffs’ alleged intention not to enter the settlement agreement
17 was unexpressed until April 2, 2012, the date that the March 30, 2012, affidavit
18 and declarations were filed, and any lack of express authority is not an issue
19 properly addressed in this case but instead in any subsequent case between
20 Plaintiffs and former counsel Mr. Sandlin.

1 ***Dismissal for Failure to Prosecute***

2 Defendants base their motion to dismiss on Plaintiffs' failure to prosecute.

3 A dismissal for failure to prosecute "must be supported by a showing of
4 unreasonable delay." *Omstead v. Dell, Inc.*, 594 F.3d 1081, 1084 (9th Cir.2010).

5 In addition, this Court weighs the following five factors: (1) the public's interest in
6 expeditious resolution of litigation; (2) the Court's need to manage its docket; (3)
7 the risk to defendants from delay; (4) the public policy favoring disposition of
8 cases on their merits; and (5) the availability of less drastic sanctions. *Henderson*
9 *v. Duncan*, 779 F.2d 1421, 1423 (9th Cir.1986); *Citizens Utilities Co. v. American*
10 *Tel. & Tel. Co.*, 595 F.2d 1171, 1174 (9th Cir.), *cert. denied*, 444 U.S. 931 (1979).

11 ***Unreasonable Delay***

12 The Court finds two periods of inaction by Plaintiffs to constitute the
13 "unreasonable delay" contemplated by *Omstead*, 594 F.3d at 1084.

14 First, though the Plaintiffs do not contest that they knew through their
15 current counsel of the settlement and accompanying dismissal at the latest in
16 December 2011, they did not pursue any relief in this Court until April 2012, and
17 only then in response to the Defendants' motion to dismiss. It is unclear when, if
18 ever, Plaintiffs would have pursued any remedial action had Defendants not filed
19 their motions to reopen and dismiss on February 24, 2012.

1 Second, Plaintiffs have submitted an assertion by Mr. Fitzgerald that in
2 “approximately October of 2010” he had a phone conversation with Mr. Sandlin in
3 which Mr. Fitzgerald allegedly told Mr. Sandlin “that if he was going to give up
4 that easily he was fired.” Mr. Fitzgerald recalls Mr. Sandlin telling him that he
5 would receive “some form for [Mr. Fitzgerald] to sign that would release [Mr.
6 Sandlin] from the case. ECF No. 42 at 2. Mr. Fitzgerald further asserts that he
7 “did not intend to settle the case” and that he “wanted [his] file and the document
8 necessary for [him] to proceed with another attorney.” ECF No. 42 at 2. However,
9 there is no evidence that Mr. Fitzgerald ever inquired with Mr. Sandlin further
10 about the form or otherwise pursued the matter of his termination of Mr. Sandlin as
11 counsel or, indeed, anything having to do with this case, until Mr. Fitzgerald
12 mentioned the case to Mr. Richardson in approximately Fall 2011. In addition, the
13 Court received no notification from Plaintiffs in response to the Court’s December
14 21, 2010, text order closing the file and granting leave to file settlement
15 documents, until Plaintiffs’ declarations filed in April 2012.

16 ***Court’s Need to Manage Its Docket and Risk to Defendants from Delay***

17 Both the Court and Defendants had a firm basis to believe that this case was
18 resolved in December 2010, and have acted in accordance with that resolution of
19 the matter since that date. The scheduling order in this case became moot when
20 the Court received notice of settlement, and the Court removed the case from its

1 trial calendar. The Court now has expended considerable time and effort
2 reopening the case, *see* ECF No. 38, and addressing the currently pending motions.
3 These efforts touch heavily upon the Court's need to manage its docket efficiently
4 and effectively. Moreover, to allow Plaintiffs to withdraw from the settlement and
5 proceed with this case now, nearly two years after they claim that Mr. Fitzgerald
6 fired Mr. Sandlin, would prejudice the Defendants' ability to respond to Plaintiffs'
7 claims, which concern events that occurred nearly four years ago. Witnesses'
8 memories may have faded and other discovery may have been destroyed.

9 ***Public Policy***

10 Although public policy favors disposition of cases on their merits, public
11 policy also strongly favors settlements. Once a settlement is entered, it may be set
12 aside only if the client produces "proof that the attorney had no right to consent to
13 its entry." *Edwards v. Born, Inc.*, 792 F.2d 387, 390 (3d Cir. 1986) (internal
14 quotations omitted). Although Plaintiffs have submitted recently drafted
15 declarations alleging that Mr. Sandlin did not have actual authority, the record is
16 replete with Mr. Sandlin's declarations and emails that support that he had either
17 actual or apparent authority to consent to entry of the settlement. ECF No. 31.

18 ***Availability of Less Drastic Sanctions***

19 The Plaintiffs are seeking to reopen the case to have an opportunity to
20 relitigate the case. However, given Mr. Sandlin's actual or apparent authority to

1 settle this case on behalf of the Plaintiffs, the Defendants' reasonable reliance on
2 Mr. Sandlin's actual or apparent authority, and the time that has elapsed before
3 Plaintiffs have challenged Mr. Sandlin's authority or requested to reopen this case,
4 the Court finds that dismissal is the least drastic sanction available.

5 **CONCLUSION**

6 The Court finds that if Mr. Sandlin did not have actual authority to settle this
7 case, he had apparent authority to settle this case. The Plaintiffs' failure to obtain
8 substitute counsel to pursue this case, to prosecute this case, or to object to the filed
9 settlement notice in this case, justify dismissal of this case with prejudice.

10 Alternatively, the Court would enforce the settlement agreement and dismiss this
11 case with prejudice based on Defendants' payment of the settlement funds into the
12 Court's registry.

13 Accordingly, **IT IS ORDERED:**

14 1. Defendants' motion to dismiss for failure to prosecute, **ECF No. 27**, is

15 **GRANTED**. This matter is **DISMISSED WITH PREJUDICE**.

16 2. Plaintiff Diane Fitzgerald's motion for voluntary dismissal as a party,

17 **ECF No. 41**, is **DENIED AS MOOT**.

18 3. Defendants are directed to deposit the settlement amount of \$5000.00

19 into the Court's registry **by June 1, 2012**. Upon deposit of the funds, the

20 District Court Executive **shall disburse** the sum \$5000.00 in the form of

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1 a check made payable to “Dave and Diane Fitzgerald.” The Court further
2 directs the District Court Executive **to deliver** the check to Todd Samuel
3 Richardson, 604 Sixth Street, Clarkston, WA 99403.

4 The District Court Executive is hereby directed to enter this Order, provide
5 copies to counsel, and close the file in this case.

6 **DATED** this 21st day of May 2012.

7
8 *s/ Rosanna Malouf Peterson*
9 ROSANNA MALOUF PETERSON
Chief United States District Court Judge